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DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF the Joint Application)
of NorthWestern Corporation and)
Babcock Brown Infrastructure Limited,)
BBI US Holdings Pty. Ltd., BBI US)
Holdings II Corp., and BBI Glacier Corp.)
for Approval of the Sale and Transfer of)
NorthWestern Corporation Pursuant to a)
Merger Agreement)
-----)

UTILITY DIVISION

DOCKET NO. D2006.6.82

OPENING BRIEF

INTRODUCTION

In accordance with the Commission's briefing schedule, NorthWestern Corporation, d/b/a NorthWestern Energy ("NorthWestern") and Babcock and Brown Infrastructure Limited ("BBI"), the Joint Applicants, respectfully submit their opening brief. In sum, NorthWestern and BBI jointly believe that the Commission is compelled by the record and legal precedent to approve the transaction by which NorthWestern is sold to and merged with BBI Glacier Corp. ("Glacier"), a Delaware corporation and a wholly-owned indirect subsidiary of BBI, a

special purpose company formed to merge with and into NorthWestern. The sole issue for decision is what conditions may be appropriately imposed by the Commission upon the sale. NorthWestern and BBI have agreed to the imposition of a majority of the conditions proposed by the parties to ensure adequate service at just and reasonable rates as well as the continuation of existing special protections, as more fully stated herein.

On June 7, 2006, the Joint Applicants, filed with the Commission what they denominated their Joint Application in Compliance with Consent Order and Required Notification ("Joint Application"). The Joint Application advised the Commission that NorthWestern and BBI had entered into a definitive agreement under which BBI would acquire all of the common stock of NorthWestern, and the related assumption all of its debt, under an "Agreement and Plan of Merger". The Joint Application was docketed as PSC Docket D2006.6.82.

Petitions to intervene were filed by the Montana Consumer Counsel ("MCC"), the Montana Large Customer Group, Colstrip Energy Limited Partnership, Yellowstone Energy Limited Partnership, District XI Human Resource Council, Natural Resource Defense Council, Renewable Northwest Project, American Association of Retired Persons, International Brotherhood of Electrical Workers, South Dakota Public Power, Inc., and Heartland Consumers Power District. Despite the objection of the Joint Applicants that South Dakota Public Power and Heartland Consumers Power District lacked standing to intervene, the Commission granted all of the Petitions. Additionally, the week before hearing, the Commission granted a petition for late intervention filed by what have been denominated the Ammondson Plaintiffs, over the objection of the Joint Applicants.

Accordingly, there are twelve Intervenor in the docket. All of the Intervenor who intervened in a timely fashion had an opportunity for discovery, and the pre-filing of testimony in opposition to the Joint Application. Seven of the Intervenor, together with the Staff of the Commission, submitted discovery to the Joint Applicants. In response to the discovery, the Joint Applicants produced what can fairly be described as a prodigious amount of information about the Joint Applicants and the Agreement and Plan of Merger.

None of the Intervenor who filed pre-filed testimony urged rejection. Five of the Intervenor's pre-filed testimony advocated that the Commission condition its approval of the Joint Application upon various terms described in their pre-filed testimony. The MCC presented the testimony of Dr. John Wilson, who proposed seven conditions to approval. District XI Human Resource Council, Natural Resource Defense Council, and Renewable Northwest Project presented the testimony of Dr. Tom Powers and Ms. Ann Gravatt, who proposed a series of objectives and undertakings that NorthWestern should pursue, primarily in the area of renewables, but did not formally introduce conditions to approval. AARP presented the testimony of Ms. Barbara Alexander, who proposed six conditions to approval.

The Joint Applicants pre-filed testimony in rebuttal to the Intervenor testimony. NorthWestern presented the rebuttal testimony of its President and CEO, Mr. Michael J. Hanson, as well as its Vice President of Government and Regulatory Affairs, Mr. Patrick R. Corcoran. BBI presented the rebuttal testimony of its Chief Executive Officer, Mr. Steven Boulton, as well as its Chief Financial Officer, Mr. Jonathon Sellar.

The Commission conducted a contested case hearing on March 14-16, 2007. This Opening Brief is being filed pursuant to the briefing schedule set by the Commission at the close of hearing.

FACTUAL BACKGROUND

The Joint Application is the final chapter of the bankruptcy of NorthWestern. On September 14, 2003, NorthWestern filed a petition for relief in Bankruptcy Court under Chapter 11 of the United States Bankruptcy Code (11 U.S.C. §§ 101 *et seq.*). Both the Commission and the MCC actively participated in the bankruptcy proceedings. On July 8, 2004, NorthWestern, the Commission, and the MCC entered into a stipulation, which was filed in the bankruptcy proceedings and approved by the Bankruptcy Court (“Bankruptcy Stipulation”). The Bankruptcy Stipulation included a Consent Order to be issued by the Commission in its own investigation into the financial solvency of NorthWestern, an order, which became Consent Order 6505e entered in PSC Docket D2003.8.109.

The Bankruptcy Stipulation and Consent Order recognized the likelihood that NorthWestern would be acquired by another company after it emerged from bankruptcy, and required NorthWestern to provide at least 45 days advance notice to the Commission “of an irrevocable commitment or undertaking on the part of NorthWestern to transfer, merge, sell, lease, encumber, or otherwise enter into any disposition transaction involving its Montana Public Utility Assets or facilities.” Bankruptcy Stipulation, ¶ 4(b)(ii); Consent Order, ¶ C.1.b.

The Consent Order was issued by the Commission on September 2, 2004. So convinced was the Commission that NorthWestern would be acquired after it emerged from bankruptcy that it issued, *sua sponte*, on October 18, 2004, its “Statement of Factors for Evaluating Proposals to Acquire NorthWestern Energy.” The Joint Application in this docket was prepared and filed with the Commission to fulfill the agreed upon notice requirement set forth in both the Bankruptcy Stipulation and the Consent Order.

LEGAL BACKGROUND

A. Utility Ownership and Asset Transfers

Any objective analysis of the Commission's legal authority to address mergers and acquisitions will demonstrate that the Commission's authority, at most, is limited to the imposition of conditions to ensure adequate service at just and reasonable rates. Under no reading of prior Commission precedent or statutory authority can it be argued that the Commission can directly reject the transaction. In this matter, NorthWestern and BBI have directly addressed and accepted all reasonable conditions proposed, as discussed below, consistent with both state law and the special agreements that govern NorthWestern from the bankruptcy proceeding.

A rational purchaser of a public utility in Montana wants to forge a good relationship with the Commission. Rational purchasers have long been willing to provide the Commission with reasonable assurances that their acquisitions will not adversely impact the rates or the quality of service of the utility being acquired. Since no rate changes can occur to Commission jurisdictional services without Commission approval being first obtained through a rate filing, reasonable assurances on rate impacts are not particularly difficult to identify or implement. The greater difficulty has typically been in defining and implementing reasonable assurances as to the quality of service. In this case, that task has been substantially eased through reference to the previously conducted Liberty Audit, which has been incorporated in the Consent Order at ¶ E.

The Commission has recognized that it does not have the legal authority to approve or disapprove the acquisition of NorthWestern by BBI under the Agreement and Plan of Merger. Beginning with its enactment of the enabling legislation for the Commission in

1913,¹ the Montana legislature has refused to vest the Commission with the power either to control entry into the utility business in Montana, or to control utility ownership in Montana.

Entry and ownership of regulated entities are generally controlled through a certificate system, under which a certificate of authority issued by the regulator, or the transfer of that certificate, controls who is entitled to be the provider of the regulated service. Montana has enacted a certificate system for motor carriers under Commission regulation. Mont. Code Ann. §§ 69-12-101 *et seq.* It has not enacted a certificate system for the utilities the Commission regulates:

Many of the states have enacted statutes...requiring a utility, before it commences the construction of any part of its plant, to procure from the Commission a certificate of public necessity or convenience. Thus far our legislature has enacted no such statute.

Great Northern Utilities Company v. Public Service Commission, 88 Mont. 180, 218, 293 P. 294 (1930). Accordingly, the Commission recognized long ago that it actually lacks authority over sales or transfers of utilities. “This Commission does not have authority over transfers and sales of utilities.” *In Re Eastside Telephone Company*, Montana Board of Railroad Commissioners Ex-Officio Public Service Commission, 77 Public Utility Reports, New Series, 87 (1948).

There has been no change in the Commission’s enabling legislation since either the Montana Supreme Court’s *Great Northern Utilities* decision in 1930, or the Commission’s own decision *In Re Eastside Telephone* in 1948, to vest the Commission with authority over utility sales and transfers. Indeed, the Commission failed to obtain such a change to its

¹ Chapter 52, Montana Session Laws of 1913.

enabling legislation in the last three completed legislative sessions - 2001, 2003, and 2005.²

The Commission has claimed in recent years, an implied power over utility transfers under its authority to ensure adequate service at just and reasonable rates:

Public utilities are required to provide reasonably adequate service and facilities at just and reasonable rates. Section 69-3-201, MCA. The transfer and ownership of MDU's facilities and propane system in Culbertson will not result in inadequate service or unreasonable rates.

In The Matter of the Application of Montana-Dakota Utilities for Approval of the Sale and Transfer of the Assets and Operating Responsibilities of the Propane System in Culbertson Montana to Miller Oil Company, Order 6025, PSC Docket D97.10.197. The standard was specifically referenced in the Consent Order at ¶ 2, and incorporated by MCC witness Dr. Wilson in his pre-filed testimony. Exhibit MCC-3, pp. 3-4.

Assuming, arguendo, that the Commission can imply a power it once frankly admitted it did not possess, the implied power necessarily must be limited in scope to the basis for the implication, protecting against unwarranted rate increases or deterioration in the quality of service. Stated another way, the Commission does not have the authority to say no; nor the authority to say it wants a different buyer; nor the authority to adopt a "net benefit" standard for changes in utility ownership.³

Both the Bankruptcy Stipulation and the Consent Order acknowledged that NorthWestern could raise in this filing the lack of Commission jurisdiction:

The provision of such notice in accordance with this Agreement and the Consent Order shall not be deemed or construed to constitute an admission or acknowledgment by NorthWestern that the MPSC has jurisdiction over any

² Senate Bill 276, 2001 Legislature; Senate Bill 234, 2003 Legislature; House Bill 106, 2005 Legislature.

³ AARP witness Barbara Alexander suggested a "net benefit" standard.

such disposition under Montana law. And NorthWestern reserves the right to contend to the contrary...

Bankruptcy Stipulation, ¶ 4(b)(ii); Consent Order, ¶ C.1.b.

B. The Consent Order

The continuing and effective provisions of the Consent Order are binding upon the successors and assigns of NorthWestern. Consent Order, ¶ F. Accordingly, the Consent Order is as binding upon NorthWestern post acquisition by BBI as it is right now. Additionally, the Consent Order reserves to the Commission the authority to modify it upon application of NorthWestern. Consent Order, ¶ L. The standard for approving modifications to the Consent Order is the same standard, adequate service at just and reasonable rates, as under the Commission's claim of an implied power to review and approve sales or transfers of utility assets. The Consent Order specifically incorporates that standard in ¶ L by incorporating the provisions of Section 69-3-201, MCA.

ARGUMENT

A. Overview

Although the BBI acquisition of NorthWestern may at first blush look complex, it is not. BBI will acquire all of NorthWestern's stock. Ownership of NorthWestern will be transferred from many short-term investors to a single long-term investor. NorthWestern will continue as a stand-alone utility. The transaction is designed both to preserve NorthWestern as it exists today, and ring fence it from BBI's other operating companies. The proposed transaction offers the unique opportunity to meld together the positive attributes of NorthWestern as an operating company with the positive attributes of BBI as its owner.

B. The Positive Attributes of NorthWestern

On November 1, 2004, NorthWestern emerged from bankruptcy. In the bankruptcy, NorthWestern was restructured as a “back to basics” utility, refocused on providing safe and reliable utility service at reasonable rates. Since bankruptcy, it has continued its efforts to improve its financial stability and improve the quality of service it provides. The significant progress it has made is best evidenced by the testimony of the Intervenor in this docket.

In testimony filed on behalf of the MCC, Dr. John Wilson stated: “NorthWestern’s current management team has performed well in restoring NorthWestern to financial health and functionality as a utility following this company’s emergence from Chapter 11 protection on November 1, 2004.” Wilson Direct, Exhibit MCC-3, p. 10, Ins. 12–15.

Dr. Thomas M. Power, on behalf of District XI Human Resource Council, Natural Resources Defense Council and Renewable Northwest Project stated:

“NorthWestern has continued to provide reliable natural gas and electric service to customers in Montana. As far as I am aware, NorthWestern has managed and maintained the transmission and distribution systems well. Although it took NorthWestern a relatively long time to put a long-term default supply portfolio in place, that job is almost finished. Fortunately NorthWestern’s customers were not faced with another market “meltdown” like that in 2000-2001 while NorthWestern, for many years, was primarily relying on market purchases to serve default supply customers. NorthWestern has also played a very productive role on a variety of other fronts:

- i. It has invested in favorably- priced, wind-electric generation that mitigates the significant price risk associated with future carbon regulation and has been engaged in efforts to understand and manage integrating wind into the electric grid.
- ii. It has expanded its efficiency and demand side management programs. However, with higher energy prices, there is more cost effective DSM available to be pursued and it could be pursued on a more aggressive schedule.
- iii. It defended the USB program and all of its authorized public purposes while endeavoring to strike an appropriate funding balance among the various programs.
- iv. It has supported, overall, low-income programs during a period of rising market prices for energy focusing not only on low-income discounts but also ongoing low-income weatherization programs.

My impression is that NorthWestern, in most areas, has served Montana customers well since it took over the Montana Power non-generating assets.”

Power Direct, Exhibit HRC-1, p. 7, ln. 21 through p. 8, ln. 15.

Ms. Ann English Gravatt, on behalf of the District XI Human Resource Council, Natural Resources Defense Council and Renewable Northwest Project stated:

“NorthWestern has recently made a significant wind acquisition. Judith Gap is an important first step. NorthWestern made a very sound business decision to secure that project, as it is now providing very low cost and clean energy for its customers.” Gravatt Direct, Exhibit HRC-2, p. 4, lns. 17-19. Ms. Gravatt also stated: “NorthWestern began to develop a demand side management program. Although it took several years, NorthWestern has now begun to acquire MWs – at a rate of about 5 MW per year. The Company is to be commended for its efforts. Relative to other Montana utilities, NorthWestern is the only one that has made any real attempt to acquire this largely untapped resource.” *Id.* at p. 6, lns. 12-14.

C. The Positive Attributes of BBI

The Commission has acknowledged that “[t]here is positive value for utility rate payers in being served by a company that genuinely wants to excel in the provision of regulated utility service.” *In the Matter of the Joint Application for Approval of the Sale of Montana Power Company to NorthWestern Corporation*, PSC Docket D2001.1.5, Order 6353c at ¶ 21. BBI, has agreed to purchase NorthWestern in order to further expand its footprint in the utility sector. The uncontroverted testimony is that BBI invests in utility infrastructure for the long-term, and that it is committed to excel in providing regulated utility service. Perhaps the best assessment of BBI’s value to NorthWestern and Montana is well stated in Mr. Hanson’s testimony, where he outlined the positive factors BBI’s ownership

would have on the Montana utility:

Q. Why was BBIL selected?

A. Our Board determined that BBIL's offer provided the best value for all our stakeholders customers, employees, regulators, and stockholders. BBIL provides access to capital, access to expertise and long-term stability to our stakeholders - employees, customers, communities and regulators. It is NorthWestern's view that not only will a sale to BBIL not adversely affect our ability to serve our customers, we believe it will enhance our ability to provide safe and reliable service at reasonable rates well into the future. NorthWestern believes that it is in the interest of customers to have long term owners with focus and experience in core utility assets and infrastructure rather than owners focused on short term returns, particularly if new investment is required. For example:

- BBIL is committed to a long-term conservative utility ownership with a proven track record of owning energy distribution and transmission, and power generation companies and assets;
- BBIL has a demonstrated ability to access low cost capital in many financial markets for its business operations;
- BBIL's business approach emphasizes local management, local jobs, and local growth, including investing in infrastructure replacement, transmission and power production, including renewables;
- BBIL is committed to providing NorthWestern additional capital to fund further economic investments;
- BBIL, through its strategic relationship with Babcock and Brown may also provide access to other investment vehicles which specialize in renewables and other infrastructure which could benefit Montana;
- Current employees will be retained, no reductions, relocations or replacements, and continuation of the level of employee benefits;
- Change in ownership should be transparent to customers - we will have the same employees, same quality service, same name, same commitment to customers and communities, and same regulatory oversight; and
- Lastly, BBIL was willing to pay a competitive price for NorthWestern.

Hanson Direct, Exhibit JA-2, pp. 10-11.

Mr. Michael M. Garland confirmed BBI's commitment to long-term utility ownership in

his Direct Testimony:

Q. Why is BBI acquiring NorthWestern?

A. BBI is a utility infrastructure owner with a conservative approach to the utility business. It is committed to owning and operating utility and infrastructure assets on a long-term and financially stable basis. BBI has been attracted by the quality of NorthWestern's assets, its stable existing customer base and its steady growth opportunities. To those features, BBI will bring consistency of

long-term ownership, broad-based expertise in gas and electric transmission and distribution, power generated and renewable energy, and a strong financial position. (emphasis added)

Garland Direct, Exhibit JA-3, p. 6, ln. 16. There is no evidence in the record to suggest that BBI would be anything other than a financially sound and capable long-term owner of NorthWestern. Indeed, the record reflects that there are a significant number of benefits to be gained by BBI's acquisition of NorthWestern.

Mr. Boulton testified that BBI will allow NorthWestern to operate in the same manner as it is now, with one key exception - its sole shareholder will be a long-term investor, not vulture capitalists or other short-terms investors with no commitment to fund key projects or initiatives that NorthWestern wishes to undertake. Boulton Rebuttal, Exhibit JA-4, p. 4, Ins. 9-25. This commitment by BBI, through its Chief Executive Officer, is extremely important in that subsumed in his statement is a firm commitment to: (1) retain existing rank and file and management employees (As the Merger Agreement provides at § 5.11(2), benefit plans will also be maintained.); (2) maintain the customer focus that the rank and file employees have committed themselves to improve; and (3) improve the relationship NorthWestern has with its duly elected regulators. *Id.* at p. 4, Ins. 16-25.

In addition, Mr. Boulton testified that BBI would bring to NorthWestern a series of improvements involving the discipline of both short and long-term rigorous planning processes, including a one-year operating plan, a three-year strategic plan and a ten to fifteen-year asset management plan. Tr. Vol. 3, p. 110, Ins. 16-21. He noted that BBI's business is generally run according to these plans and that the plans are driven by the interface with customers. *Id.* Mr. Boulton stated that these three plans, along with customer demand and the age and condition of the assets drive the business going forward, not the acquisition model as suggested by Dr. Wilson in his testimony. *Id.* Mr. Boulton further

stated that BBI would bring its international expertise to the foundation that's already been formed by NorthWestern to improve performance. *Id.*

In this docket, the Commission's deliberations will necessarily focus on whether BBI can ensure NorthWestern is capable of providing adequate service at just and reasonable rates. Mr. Boulton testified that BBI intends that NorthWestern will continue to provide adequate service at just and reasonable rates by keeping the Montana workforce intact. Additionally, Mr. Boulton has stressed that BBI will ensure that NorthWestern will follow the Liberty Audit findings and recommendations. By not introducing wholesale changes to the management or rank and file, and by committing to the Liberty Audit, NorthWestern under BBI ownership will ensure continuity of service. Moreover, by retaining the existing workforce, BBI retains the current personnel who have demonstrated the ability to acquire an appropriate energy supply under the Commission's guidelines and have the experience and expertise to complete and maintain the default supply portfolios. By keeping both management and the rank and file employees intact, BBI, as owner of NorthWestern, will focus on the location where the majority of those employees live and work - Montana.

The commitment to the rank and file employees is embodied in the Agreement and Plan of Merger executed by BBI and NorthWestern. Such a commitment would likely be unavailable to NorthWestern's employees if any established utility entity other than BBI were the proposed successor. Unlike BBI, an established utility would, in all probability, as in other mergers, consolidate their workforce resulting in the potential loss of jobs in Montana.

Mr. Boulton's described in his rebuttal testimony how NorthWestern will manage its financial affairs in substantially the same manner post acquisition as it has pre-acquisition. NorthWestern will pay its operating expenses as they accrue, pay its cash taxes, pay its debt service obligations, fund its budgeted capital and maintenance expenditures, and

maintain NorthWestern's liquidity in the business to fund the day-to-day operating requirements, including the purchase of natural gas and electricity to meet the critical default supply obligations. Boulton Rebuttal, Exhibit JA-4, p. 5, Ins. 20-31; p. 7, Ins. 16-23. In addition, BBI will ensure that NorthWestern continues its commitment to the communities it serves.

D. The Proposed Transaction Satisfies the Statement of Factors

The Joint Applicants are acutely aware of the "Statement of Factors for Evaluating Proposals to Acquire NorthWestern Energy," published *sua sponte* by the Commission on October 18, 2004. The Joint Applicants are also fully aware of the limitations expressly imposed on those factors:

[the factors] are "not intended to chill the advancement of any prospective purchase of NorthWestern that can demonstrate its ability to provide adequate service at reasonable."

Statement of Factors, p. 1.

The Joint Applicants recognize the avowed purpose of the Statement of Factors:

The Commission seeks a stable, consumer-focused, utility-focused, and Montana-focused provider of electric and natural gas distribution, provider of last resort, and other related services, regardless of the corporate identity or the form of organization.

Based on the PSC's experience, a superior acquisition proposal and acquirer is likely to have a preponderance of these elements and characteristics

Statement of Factors, p. 2.

As discussed throughout this brief, the pre-filed testimony and the live testimony adduced at the hearing clearly show that BBI's ownership of NorthWestern will:

- lend financial strength to NorthWestern because of BBI's investment grade rating and based on BBI's well established and well documented access to the international capital markets;

- insure NorthWestern's ability to satisfy its obligations to complete the electrical default supply portfolio because of BBI's contractual commitment to retain the existing workforce;
- enhance system integrity and reliability based on BBI's commitment to fully adopt and implement the Liberty Audit findings;
- exhibit a demonstrable Montana focus based on BBI's commitment to the retention of the Montana NorthWestern employees;
- insure a utility focus because BBI is committed to own and operate utility assets; and
- demonstrate BBI's customer focus based on BBI's commitment to retain the existing rank and file employees and its unqualified commitment to the Liberty Audit.

In short, BBI's purchase of NorthWestern easily satisfies a preponderance of the factors deemed important to the Commission in the October 18, 2004 Statement of Factors.

E. BBI's Acquisition of NorthWestern Will Strengthen the Utility

The sale of NorthWestern to BBI removes the last remaining major obstacle to NorthWestern achieving financial stability. Since bankruptcy, a very real problem has existed in that NorthWestern's current shareholders are intent on either a sale of NorthWestern, or extracting funds through some other means to achieve monetary gain. In light of the shareholders' goal to divest themselves of their interests, the challenge faced by NorthWestern is to provide the customers of Montana with safe and reliable service at stable and reasonable rates "without the distraction and uncertainty of investors with short-term monetary goals," and allow NorthWestern to clearly focus on utility business. Hanson Direct, Exhibit JA-2, p. 2, Ins. 25-29; Tr. Vol. 2, p. 221, In. 17 through p. 222, In. 9.

The various entities that purchased the debt of NorthWestern when it was in bankruptcy were aggressive distressed debt investors, looking for short-term returns. Those investors received shares of NorthWestern's stock in return for the debt that they had

purchased. NorthWestern Data Request Response, MCC-135. While there has been significant turnover of the ownership base from bankruptcy to now, there remain a significant number of short-term investors. Many current investors bought stock from the post-bankruptcy investors in anticipation of the announced sale to BBI. This type of investor, called an arbitrage investor, buys the stock based on the likelihood that the announced transaction will close. Such investors are also not long-term stockholders. They are merely looking to get a short-term return by owning stocks that are awaiting completion of the transaction at a predetermined price.

Regardless of changes in the names of investors, the majority of NorthWestern's current owners continue to have a very short-term investment viewpoint, underscoring NorthWestern's concern about its financial stability. NorthWestern Data Request Response, MCC-134. Mr. Hanson described the pressures exerted by NorthWestern's current shareholders before the Agreement and Plan of Merger was announced, and what would likely occur if the transaction is not closed. Tr. Vol. 1, p. 104, ln. 2 through p. 107, ln. 1; Vol. 1, p. 139, ln. 18 through p. 140, ln. 2.

There may be no clearer evidence in support of NorthWestern's concerns about its current ownership situation than that of a current owner. Mr. Hanson's concerns were echoed very clearly by a representative of one of its current owners, Mr. Tim Everett of Amber Capital:

"One thing I would say, in my opinion, if the deal was blocked, we as stakeholders would push for the company to be sold, which considering the infrastructure funds that have been established by many Wall Street firms, we believe there would be enough interest in this type of asset. And we would also seek to have a lot of the cash that the company is generating returned to the shareholders, either through an increase in the dividend or a share buy back."

Tr. Vol. 1, p. 221, lns. 4-13.

The Commission and the MCC anticipated during the bankruptcy proceedings that NorthWestern's new shareholders would likely want to sell the Company. As explained by Mr. Hanson, in both his Direct Testimony and on cross examination, Exhibit JA-2, p. 9, ln. 16 through p. 10, ln. 24; Tr. Vol. 1, p. 129, ln. 7 through p. 132, ln. 3, NorthWestern's Board of Directors, in the exercise of its fiduciary duties, retained legal and financial advisors to evaluate all of the strategic alternatives to maximize the long-term value of the organization to its shareholders, while assuring continued success in providing safe, reliable and economic service to its customers. This evaluation took into consideration the needs and expectations of all stakeholders -- customers, employees, regulators and stockholders. The considerations included continuing as a stand-alone company, a financial restructuring, various merger scenarios and sale of the company. After a thorough review and analysis of these strategic alternatives and in consideration of the final proposals, the Board determined that a sale of NorthWestern to BBI was the best means of maximizing stockholder value and preserving safe, reliable and economic service for the NorthWestern customer.

BBI is committed to being a long-term, conservative utility owner with a business plan premised upon owning utility assets with a long-term investment horizon with key operating decisions to be made by management at each geographical location. As explained by Mr. Garland, BBI's business strategy reflects its investors' investment profile. Tr. Vol. 1, p. 142, ln. 12 through p. 144, ln. 6. BBI will bring consistency of ownership, broad-based operational expertise in gas and electric transmission and distribution, power and renewable energy, and a strong financial position. BBI intends to invest in and grow the utility business, and has committed to maintaining existing employee and customer service levels. Its business approach emphasizes local management, local jobs and local economic development and growth, including investing in infrastructure replacement, transmission and

power production. BBI is committed to funding necessary further economic investment in the utility networks and sees opportunities for in-state growth in transmission and generation.

The benefit of an owner with a long-term investment horizon was not lost on the Intervenor. Ms. Gravatt agreed that a long-term focus is a very important factor. In response to the question: "What is it about this transaction that is particularly appealing to you?", she stated, "The long-term investment perspective that BBI brings to the transaction is rare and appealing." Gravatt Direct, Exhibit HRC-2, p. 3.

BBI's stated interest in long-term ownership of NorthWestern means that NorthWestern will have continued support of its capital needs for expansion and growth projects, maintenance, and infrastructure development at a potentially lower cost than NorthWestern as a stand-alone utility could obtain today. NorthWestern will continue to invest in maintenance, growth and infrastructure projects in accordance with its operating and long-term asset plans. In the future, to the extent NorthWestern requires additional capital for (unregulated) expansion projects it would, as it does now, determine if such investment had the ability to earn a reasonable rate of return and then request approval from its board of directors, whether that board is a public board or an internal board.

BBI has a direct interest in ensuring that its investments (operating companies such as NorthWestern) are receiving the necessary capital to further maintain and grow through expansion of their own infrastructure. BBI has made capital expenditures and commitments in its existing operating companies totaling in excess of \$1 billion in its fiscal year ended June 30, 2006. Garland Direct, Exhibit JA-3, p. 10, ln. 21 through p. 11, ln. 6.

F. Conditions of Approval

Given the nature of BBI's proposed acquisition of NorthWestern, the only real issue

in this case is how to deal with the potential for negative impacts under a holding company structure. The issue is well summarized by Mr. Boulton in his Rebuttal Testimony:

“The issue before the Commission in this docket is whether the Sale and Transfer of NorthWestern pursuant to the Merger Agreement will have an adverse impact on NorthWestern’s customers, specifically, their entitlement under state law to adequate service at just and reasonable rates. Thus, if NorthWestern continues to provide adequate service at just and reasonable rates, as the intervenors, including the MCC, have indicated NorthWestern is currently providing, the only relevant inquiry is whether or not BBI’s investment will have an adverse effect on NorthWestern. As we demonstrate in response to Dr. Wilson’s testimony, BBI’s investment in NorthWestern will have no adverse impact on NorthWestern.”

Boulton Rebuttal, Exhibit JA-4, p. 3, Ins. 10-20.

1. MCC Proposed Conditions

The MCC proposed seven conditions to Commission approval. Wilson Direct, Ex. MCC-3, p. 17, In. 17 through p. 20, In. 4. Most of them are acceptable to the Joint Applicants as reasonable assurances that BBI’s acquisition of NorthWestern will not result a deterioration of service or unreasonable rates.

a. Non-recovery of the acquisition premium in rates

The MCC requests a prohibition against the recovery, in rates, of the \$700 million premium to book being paid by BBI for NorthWestern. The Joint Applicants agree with the proposed condition. Hanson Rebuttal, Ex. JA-6, p. 7, Ins. 6-9. Boulton Rebuttal, Ex. JA-4, p. 9, Ins. 15-22. The acquisition premium paid by BBI for the stock of NorthWestern will not be recovered in rates paid by the ratepayers of Montana.

b. Non-recovery of transaction costs in rates

The MCC requests a prohibition against the recovery, in rates, of the transaction costs incurred by NorthWestern and BBI related to the acquisition. The Joint Applicants agree with the proposed condition. Hanson Rebuttal, Ex. JA-6, p. 7, Ins. 12-14. Boulton Rebuttal, Ex. JA-4, p. 9, In. 24 through p. 10, In. 6. The transaction costs incurred by

NorthWestern and BBI relating to the acquisition will not be recovered in rates paid by the ratepayers of Montana.

c. Non-recourse financing for non-utility purposes

The MCC requests a prohibition against NorthWestern using utility assets to secure financing for non-utility projects. The Joint Applicants agree with the proposed condition. To the extent NorthWestern undertakes capital projects that are not public utility projects (i.e., to provide conventional utility service) debt financing for such projects shall not be secured by public utility assets, rather such projects shall be financed utilizing non-recourse project financing. Further, any portion of any debt financing by BBI or its affiliates, other than NorthWestern, that is devoted to any purpose other than providing funds to NorthWestern for its Public Utility operations shall be non-recourse to NorthWestern. Hanson Rebuttal, Ex. JA-6, p. 7, Ins. 12-14; Boulton Rebuttal, Ex. JA-4, p. 10, Ins. 8-30.

d. Maintaining the ring fencing provisions in the Consent Order

The MCC proposes that the ring fencing provisions in the Consent Order be maintained, subject to conforming changes. The Joint Applicants agree with the proposed condition. Hanson Rebuttal, Ex. JA-6, p. 7, ln. 16 through p. 8, ln. 8; Boulton Rebuttal, Ex. JA-4, p. 11.

It is desirable to modify the Consent Order in ¶¶ C.1 and C.2 to provide that the utility assets are to be held at the operating company, or NorthWestern level. Those paragraphs currently provide that the assets will be held at the “Parent Company” level. However, the Bankruptcy Stipulation also indicates that the “Parent Company” is NorthWestern. Bankruptcy Stipulation, First Introductory Paragraph. Post acquisition, NorthWestern remains the surviving company operating the utility assets, facilities, and operations, and the phrase “the ultimate parent corporation (the “parent”)” should mean NorthWestern. The

Consent Order should be modified in all pertinent sections to substitute “NorthWestern” for “Parent Company.”

The Consent Order should be modified further to reflect a definition of “affiliate” that would fit with the fact that NorthWestern will no longer be the Parent Company under the Consent Order. Affiliate should be defined as (1) any person that directly owns 5 per centum or more of the outstanding voting securities of NorthWestern or any company with 5 per centum or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by NorthWestern.

Another modification to the Consent Order is necessary to implement the Agreement and Plan of Merger. That change is the make-up of the Board of Directors specified in the Bankruptcy Stipulation at ¶ 4(e), and incorporated in the Consent post acquisition Order at ¶ A.1. The Bankruptcy Stipulation contemplates a Board where all directors are independent but one. Post acquisition, the stock of NorthWestern will be privately held by BBI, and the Board will be an internal Board with one independent director. The Consent Order should be modified to provide that in the event there is a sale of all of the common stock of NorthWestern, and NorthWestern remains the surviving company operating the utility assets, facilities, and operations, any board of directors that is established to govern NorthWestern shall have at least one independent director as defined in Section 1(p) and shall have substantial utility experience or qualify as a financial expert as defined by the NASDAQ Stock Market Inc. Marketplace rules (Independent Director). NorthWestern will maintain an Audit Committee and a Governance Committee with an Independent Director serving as the chairperson of each such committee.

e. Australian security filings at the Commission

The MCC proposes that BBI be required to file with the Commission all of its

Australian securities filings. The Joint Applicants agree in part with the proposed condition. Hanson Rebuttal, Ex. JA-6, p. 8, Ins. 21-26; Boulton Rebuttal, Ex. JA-4, p. 13, Ins. 13-20.

Rather than file paper copies with the Commission and the MCC, BBI will enable registration of the Commission and the MCC on BBI's website, with the effect that they will receive email notification of every public announcement made to the ASX, including a link to the announcement. This would include all public financial disclosure filings made by BBI in Australia to the ASIC or the ASX.

f. Periodic informational rate filings

The MCC proposes periodic rate filings every two years for the next ten years. The Joint Applicants believe that the proposed condition is not reasonable because of the workload it would impose upon NorthWestern, the Commission, and the MCC, but that a less onerous requirement, a filing both three and six years out would be reasonable. Hanson Rebuttal, Ex. JA-6, p. 8, Ins. 10-19; Boulton Rebuttal, Ex. JA-4, p. 12, In. 25 through p. 13, In. 7. Under that scenario, NorthWestern would make periodic informational rate filings on September 30, 2009 and September 30, 2012. The NorthWestern filings would comply with the minimum electric and natural gas rate case filing standards provided in ARM 38.5.106 through 38.5.175, and would be based on a test year using the calendar year prior to the date of the filings. In the event NorthWestern filed a general rate case within eighteen months prior to each date listed above, it would not have to make the next scheduled informational rate filing.

g. Dividends restricted to net earnings

The MCC proposes that post merger, NorthWestern be restricted from paying dividends in excess of net earnings, unless permission is first received from the Commission. The Joint Applicants do not support the proposed condition, as it is both

unreasonable and unworkable and cannot be justified on either an economic or financial basis.

As discussed by Mr. Boulton in his testimony:

First, it appears that this proposal would apply to NorthWestern as a whole and not just to its regulated Montana operations. The Montana Commission has no jurisdiction over South Dakota and Nebraska regulated operations or over NorthWestern's non-regulated operations;

Second, were the Commission to adopt such a recommendation it would usurp the legal authority of the Board of Directors, and might create a conflict with the duties the Board has under well-established legal principles regarding a board of directors' fiduciary responsibilities and the laws governing the payment of dividends;

Third, such a restriction is unnecessary to protect Montana consumers given the Commission's authority over the issuance of debt and regulation of rates, its audit and investigation authority and its review of the required filings of the financial condition of NorthWestern;

Fourth, the proposed restriction does not account for the fact that consolidated income taxes may be paid by the Holding Company and not NorthWestern as the operating company. Distributions from NorthWestern may need to include the taxes to be paid by the Holding Company as the taxpayer for the consolidated group;

Fifth, the ability to pay dividends is a function of cash flow and not book income. The proposed recommendation does not account for non-cash expenses or income. In short, just because a company may choose to pay more in dividends than its book net income in any given year does not mean it is impaired in any way from providing adequate service. Conversely, just because a company pays less than its book net income in a given year does not mean that it will be able to make the investments necessary to ensure adequate service. The relevant inquiry for the Commission is whether the operating company has to borrow money on a long-term basis to fund the payment of dividends in a given year. The Commission's authority over the issuance of debt already addresses this inquiry; and

Sixth, the long-term asset planning by NorthWestern, which will be approved by BBI and provided to the Commission, will adequately demonstrate NorthWestern's commitment to investing in maintenance and infrastructure improvements as well as growth of the system over the long-term. The Liberty Audit, which the Applicants have agreed to support, is a necessary component of long-term asset management planning.

In addition to the above concerns, neither Dr. Wilson nor the MCC offered any substantiation for the veracity of a distribution test based on net earnings, its prudence as a regulatory tool or its applicability to corporate planning and controls (utility-related or otherwise). Instead, Dr. Wilson's sole frame of reference was a single table that presented the internal distribution projections from 2009-2011 for a group of ten utility-related companies (selected by Dr. Wilson with no discernible criteria) many of whom have no resemblance to NorthWestern either in scale or in the nature of their business. Wilson Direct Exhibit JW-1, p. 9. Nor has Dr. Wilson performed any analysis to demonstrate that such a test achieves the goals either of the Commission (ensuring that NorthWestern provides adequate service at just and reasonable rates) or of BBI (ensuring that NorthWestern remains financially healthy and able meet its obligations). Moreover, he requests that the Commission simply accept such a restriction because he believes it addresses a perceived shortcoming, which he identified (and which is incorrect). Yet, neither NorthWestern nor BBI is aware of any U.S. corporation, utility or otherwise, where this restriction is imposed or has even been evaluated over time.

As referenced in Mr. Boulton's comments above, a distribution test based on net earnings ignores the fact that dividends are paid out of actual cash flows, not book income. Boulton Rebuttal, Ex. JA-4, p. 14, ln. 25. In any year or even group of years, book income and cash flow are not necessarily related. A net earnings metric completely ignores the fact that non-cash expenses and income can substantially impact the calculation of net earnings and that substantial cash flows can occur without generating net earnings. *Id.*

For example, write-offs or write-downs of undepreciated assets resulting from events such as casualties, retirements or other unanticipated events that could cover one or several

years would affect net earnings but wouldn't necessarily have an impact on cash flow. Similarly accrued expenses associated with items such as environmental liabilities, which may evolve over one or more years, but that may not come due in terms of payment for many years (if ever) would similarly reduce earnings in the year in which the liability is accrued but have no impact on cash flow in such year. (Conversely, in the year in which a payment may come due cash flow would be reduced without a corresponding impact on earnings.) As a recent example, under the condition proposed by the MCC, NorthWestern would have violated the metric last year (2006) even though the dividend it paid to its shareholders was perfectly reasonable and appropriate. As explained by Mr. Hanson, NorthWestern paid an annual dividend of \$1.24 per share in 2006, on what looked at year-end to be net earnings of \$1.40. Tr. Vol. 2 pp. 185-186. A \$21.4 million jury verdict was entered on the claims of the Ammondson Plaintiffs in February of 2007, and had to be reflected as a charge against 2006 earnings. The resulting net earnings were less than the 2006 dividends paid. *Id.*

The proposed condition is unworkable, as it requires prior Commission authorization for a distribution in excess of net earnings. What happened to NorthWestern in 2006 is a perfect example of why the standard is unworkable. A reasonable dividend was paid out of cash flows in an amount that looked like it would be less than net earnings. It was not until two months after the close of year, and after the dividend was paid, that NorthWestern was required to take a non-cash charge against 2006 earnings that reduced net earnings below the dividend paid, but had no effect on NorthWestern's available cash flow. In this case, NorthWestern could not have been expected to obtain prior Commission authorization for dividends already paid, nor should the Commission want to be directly involved in such matters.

The MCC attempts to justify its unreasonable condition on the hypothesis of MCC witness Dr. Wilson that the BBI acquisition model shows that BBI intends for NorthWestern to pay excessive dividends. Dr. Wilson's hypothesis flies in the face of how BBI's operating companies operate within the holding company structure. Boulton Rebuttal, Ex. JA-4, p. 4, ln. 29 through p. 5, ln. 17. BBI's business plan is exactly the opposite of that suggested by Dr. Wilson. As pointed out by Mr. Boulton:

As mentioned before we don't have a contraction strategy. In fact, one of the reasons I was able to raise the 400 million so quickly, our investors looked me square in the eye, and I was asked very blunt questions. The question they asked me was, can I trust the people here, for the Commission in Montana. My response was, yes in terms of determining a just and reasonable profile for both asset base and return. My neck is in a noose today in that sense, and we have never drawn chunks of capital back. In fact, it's the other way around. There's been some commentary about how we draw cash from the business. It's simply a model as to that's how it's done. And many of our businesses we haven't drawn cash from the country at all, of origin, because capital investments have been needed. We have left the money there. There have been no cash to come out of New Zealand or UK. When they have investment opportunities, the cash stays in there and just keeps pouring in. Maybe I haven't done a good job differentiating. But the approach for us, our investors like investment. They want us to invest for them to invest in us. The only way to do that is to find businesses that are regulated, and have steady and stable cash flows without a lot of volatility. And once we purchase a business, they want to see us keep investing. As I mentioned before, I get questions about how we would treat the people in the organization and build that asset management plan. They want to see that stability stay. That requires more investment, not less. We're not a short-term large investor to drag down the capital investment and not make it or drag down the op X and not make it and draw cash out. We haven't had and don't have an example of that at all. It's exactly the opposite.

Tr. Vol. 3, pp. 140-141.

The picture that Dr. Wilson has unfairly tried to paint is extreme. As noted by Commissioner Molnar in a dialogue with Dr. Wilson:

But my first question is the perspective of a father and a grandfather. When I help my grandkids and my kids with their math, I always told them check your answer, first see if it makes sense. And some of your conclusions, frankly, I have problems with. On page--I think I'll start with Page 31, Lines 3 through 6. "BBI plans to do this by paying out 100 percent of earnings in each year, plus an additional return of capital which BBI calls advances to shareholders, averaging an additional 40 percent of

earnings. This pattern of dividend payouts continues to the year 2023." I don't know how they could make it to 2023 doing that. Now we go down to 18 and just in the question, "To your knowledge has any gas or electricity utility in the U.S. ever maintained this level of dividend payout on a sustained basis?" "No." I would believe that, that you couldn't. But rather it seems to me if BBI wanted to do this sort of thing, they would be in the vulture class or they wouldn't be looking at a regulated utility. They would be looking for an unregulated company that they could go in and do a slice-and-dice and bleed it down and make more money tearing it apart than building it up. What is wrong with that scenario?

Tr. Vol. 2, pp. 172-173.

It has been self-evident since the Bankruptcy Stipulation and Consent Order were crafted that the Commission intended to closely monitor the financial health of NorthWestern after it emerged from bankruptcy. Indeed, one of the primary purposes of the Consent Order is to impose ring fencing requirements upon NorthWestern intended to foster its financial health. The Consent Order, which is binding upon NorthWestern post merger, was crafted without reference to a restriction on the payment of dividends. Instead it relied upon workable metrics such as liquidity requirements, target capitalization ratios, and credit ratings. As Mr. Hanson testified:

There are three financial metrics embedded in the stipulation: One related to minimum liquidity; the other minimum capitalization and the third bond rating metrics. And from that, we were, I guess, took comfort that those metrics, if adhered to, would ensure it did not extract excess cash or deplete equity unduly from the corporation.

Tr. Vol. 2, p. 292. Mr. Boulton acknowledged that BBI had no objections to reasonable metrics:

In the way that BBI operates, we simpl[y] don't have net earnings as a reference point. So [we] haven't considered that as an option. We think there may be some other means of overcoming any concerns that have been raised by the interveners. I think the BK Stipulation has one there in terms of equity to total cap debt. There might be some other options. If the concern is essentially about liquidity, we've provided a response to that too. That by having that facility [of] NorthWestern 100 million, we've provided clarity about our cash flow structure, confirmation that we'll conform to the Liberty Audit. I think there are probably five or six particular areas that should overcome the need for having a net earnings related reference point."

Tr. Vol. 3, p. 122. Finally, Mr. Sellar indicated in his testimony:

I think we can address those concerns particularly with the liquidity that I've mentioned. A gearing [] similar to the one that's in the bankruptcy stipulation. And also in the bankruptcy stipulation at the moment there's a requirement to maintain investment grade credit. Those these metrics put together to me actually give -- should address your underlying concerns. And Mr. Hanson referenced these in his testimony as three financial metrics if you like that means that we can't be too aggressive on distributions, on gearing, that he segregate our debt. I think there is a way that we can address the Commission's concerns going forward.

To add to that, in terms of any breach of those covenants, the way I'll project that is something we would consider is that we come to the Commission with a remedy action to address any imbalance in those metrics. I think those three key covenants are ones that we can consider.

Tr. Vol. III, pp. 232-33. In other words, if the Commission is concerned about the potential to upstream cash flows from NorthWestern to BBI after the merger, there are reasonable and workable metrics, which NorthWestern and BBI would accept instead of the unreasonable and unworkable dividend restriction proposed by the MCC.

The Joint Applicants would accept increasing the liquidity requirement in the Bankruptcy Stipulation from \$75,000,000 to \$100,000,000, and making it applicable on an end of quarter basis. As in the Bankruptcy Stipulation as currently crafted, it would reference unrestricted cash on hand and/or immediately available credit. The Joint Applicants would also accept a stand-alone version of the book equity to consolidated total capitalization provision currently in the Bankruptcy Stipulation (40%) and make it a covenant applicable on an end of quarter basis. The ratio would be computed consistent with the existing SEC-based financial test in the Bankruptcy Stipulation, which currently applies to

the Investment Basket Test for NorthWestern affiliate interest.⁴

Presumably, the Commission, under such an alternative, would want periodic compliance reporting tied to the quarterly financial reports. Under such a reporting requirement, NorthWestern would report the results of its Liquidity Minimum and its Book Equity to Consolidated Total Capitalization to the Commission following the date on which NorthWestern filed its quarterly SEC financial statement (10Q or 10K) in respect of such quarter. Within 30 days following the issuance of a compliance report which indicated NorthWestern failed to meet either the Liquidity Minimum or Book Equity to Consolidated Total Capitalization test, NorthWestern would file a report with the Commission detailing the event(s) that led to such a result(s) and a plan of corrective action ("Corrective Plan").

If NorthWestern failed to restore its Liquidity Minimum and/or meet its Book Equity to Consolidated Total Capitalization test by the date of the next subsequent compliance report, or such later date as proposed by NorthWestern in its Corrective Plan and accepted by the Commission, the portion of any NorthWestern dividend payments to be made to its Parent Company in respect of such subsequent quarter and, if necessary, following quarters,

⁴ Adjusted Book Equity would exclude any "Acquisition Premium" included in "Total Shareholder Equity (excluding accumulated other comprehensive income)" as reported in the consolidated balance sheet in NorthWestern's quarterly or year-end financial statements filed with the SEC in SEC forms 10-Q or 10-K. The calculation would be undertaken by deducting the "Acquisition Premium" and excluding any future asset impairment charges (net of taxes) from Total Shareholder Equity. The Acquisition Premium would be defined as the change in NorthWestern's goodwill resulting solely from the BBI acquisition.

Adjusted Total Capitalization would be calculated as Adjusted Book Equity plus "Total Adjusted NorthWestern Debt", where Total Adjusted NorthWestern Debt is calculated as the consolidated Current Maturities of long-term debt and Long-term Debt reported in the Quarterly SEC Balance Sheet at a Quarter End Date, less the portion of that consolidated Current Maturities of long-term debt and Long-term Debt that is non-recourse to NorthWestern Public Utility assets.

There would need to be a provision that should a new accounting pronouncement, or amendment to existing accounting pronouncement, after the approval date of the Merger Agreement, materially affect the inputs to or calculation of the ratio, the Parties would negotiate in good faith a revised method of calculation.

related to its regulated Montana utility operations would then be limited to an amount no greater than that which would enable NorthWestern to promptly meet the Liquidity Minimum and the Book Equity to Consolidated Total Capitalization test as demonstrated in subsequent quarterly compliance reports. The obligations to comply with and report these tests should expire once the tests have been met for three consecutive years (twelve quarters).

The reasonable and workable metrics offered herein by NorthWestern and BBI provide a supportable, concrete and real-world basis upon which the Commission can assess any concerns it may have in respect of the payment of distributions by NorthWestern to BBI post-merger.

Also, as indicated, the Joint Applicants would accept a requirement that NorthWestern take all measures necessary to ensure that NorthWestern has its own independent corporate credit rating, and will use all reasonable efforts to maintain an investment grade rating, on regulated Montana utility secured debt.

2. District XI Human Resources Council Proposed Condition

Dr. Thomas M. Power proposed one condition of approval on behalf of not only District XI Human Resources Council, but the Natural Resources Defense Council and the Renewable Northwest Project. The proposed condition is that the Commission require NorthWestern to move its general headquarters from Sioux Falls, South Dakota to Montana after the Company's three year commitment to the South Dakota Public Utilities Commission. As an alternative, Dr. Power suggested that NorthWestern could establish a separate Montana regulated operations business entity.

Although NorthWestern has its corporate office, with some functions, in Sioux Falls, it has established a strong management presence in Montana. Senior leadership for the

multi-state operations of its transmission and distribution facilities, its energy supply function, regulatory and governmental affairs, and utility administrative support are all located in Butte, Montana.

Of NorthWestern's 1,350 employees, approximately 1,000 are Montana employees, of which 530 are located in Butte. The majority of NorthWestern's energy supply function is headquartered in Montana and guided by key individuals who are widely acknowledged as experts in the field.

Nonetheless, as a condition of Commission approval of the merger, NorthWestern and BBI would agree to move NorthWestern's Corporate Headquarters to Montana or establish a separate Montana regulated operations business entity after the 3-year agreement with the South Dakota Commission is complete, based upon a proper evaluation of the two options by NorthWestern and BBI. See Tr. Vol. 2, p. 47, ln. 8.

3. AARP proposed conditions

AARP proposed six conditions to Commission approval. The first four conditions related to various Universal System Benefit ("USB") programs provided by NorthWestern in conformity with Montana law, and under the supervision of the Commission:

There are numerous parties that benefit from and have specific interests in the administration of Universal Systems Benefits Programs. AARP is an active and interested part, but only one of many parties that are directly concerned with and impacted by the programs. Other parties may, and often do, have conflicting interests or positions. As AARP and Ms. Alexander are well aware, the MPSC is already very active in on-going oversight and regulation of Montana Universal System Benefits and these four items.

Corcoran Direct, Ex. JA-5, p. 5, lns. 22-26. As explained by Mr. Corcoran, there are many interest groups deeply involved with the USB programs who are not participants in this docket. *Id.* at p. 6, lns. 14-18. It simply is not appropriate to address in this docket issues which have no relationship to the transaction, and for which there are on-going forums in

which they can be raised.

4. Ammondson Plaintiffs

Because of their late intervention, the Ammondson Plaintiffs did not offer any testimony. However, the reason for their intervention has been abundantly clear - they want the Commission to condition its approval of the Agreement and Plan of Merger upon NorthWestern either abandoning its appeal of their favorable jury verdict, or setting aside separate funds for payment of the verdict, should it be upheld on appeal.

The declared position of the Ammondson Plaintiffs in these proceedings is unlawful, as the Commission lacks the power to obstruct or discourage judicial proceedings, including a NorthWestern appeal of the jury verdict in favor of the Ammondson Plaintiffs. In civil litigation, the right of a party to appeal a District Court judgment arises under the Montana Rules of Appellate Procedure (Mont. R. App. P.) adopted by the Montana Supreme Court in accordance with its plenary powers under the Judicial Article of the Montana Constitution, Article VII, Mont. Const.

The Commission's enabling legislation expressly forbids the Commission from even attempting to exercise judicial powers: "[P]rovided that nothing in this chapter shall be construed as vesting judicial powers on said commission". Mont. Code Ann. § 69-3-103(1). The demand of the Ammondson Plaintiffs that a business transaction unrelated to their tort claims against NorthWestern be conditioned upon NorthWestern and BBI giving up their civil rights is extraordinarily misguided.

In apparent acknowledgment of their own overreaching, the Ammondson Plaintiffs suggest as a back up position that the Commission should require in this docket, as a condition of its approval of NorthWestern's merger with BBI, a set aside of funds for payment of their jury verdict. However, that too is offensive to basic constitutional principles

governing the separation of powers. It is the Montana Supreme Court which has been vested with the power to determine proper security for purposes of appeal in a civil case, such as that between the Ammondson Plaintiffs and NorthWestern. In fact, on April 9, 2007, NorthWestern posted a \$28.5 million bond with the trial court to stay the execution during the court's review of the post trial motions and during any appeal.

G. Additional Measures - Operating and Asset Management Plans

As noted by Mr. Boulton in the technical hearing, BBI would bring to NorthWestern a series of improvements, involving the discipline of both short and long-term rigorous planning processes. It is BBI's intent that NorthWestern executives will prepare and submit to the NorthWestern Board on an annual basis for the Board's review and approval, the following planning documents. Once approved by the Board, these planning documents will be provided to the Commission and other stakeholders:

1. Asset Management Plan – The Asset Management Plan is a 10-15 year planning tool focusing on system planning, including asset technology and selection, regulatory undertakings, supply/demand balancing and the combined capital expenditures and operating expenditures required to meet the demands of the key business stakeholders over the long term. Key drivers for NorthWestern's business would include customer peak and average demands, age and condition of existing assets, reliability and quality of supply expectations and rate of new connections.

2. Strategic Plan - The Strategic Plan is a 3-5 year planning tool that uses the Asset Management Plan as a key input. The Strategic Plan considers the range of key drivers relevant to NorthWestern's businesses (including engineering, financial, commercial, business and environmental factors) and provides stakeholders with information about the businesses' vision, mission, guiding principles and key customer, community and safety

focus for the medium term period. Key performance indicators that the business is targeting would be provided. Asset and business strategies that would be implemented and monitored would be described in the document.

3. Annual Operating Plan - The Annual Operating Plan is a short-term plan, which drives the key focus for the business for the immediate financial and reporting year. The Strategic Plan is one of the key input drivers for the Annual Operating Plan. The output of the plan is the annual budget against which the board would approve and monitor performance. The Annual Operating Plan describes the expected management actions, revenue expectations and operating and capital expenditures for the period.

CONCLUSION

NorthWestern and BBI assert that the Commission is compelled by the record, legal precedent and prudent business judgment to approve the proposed transaction by which BBI acquires all of the stock of NorthWestern which is merged with Glacier pursuant to the terms of the Agreement and Plan of Merger. The sale of NorthWestern to BBI removes the last remaining major obstacle to NorthWestern achieving financial and operating stability. In addition, NorthWestern and BBI believe that the acquisition would be good for NorthWestern, good for BBI and good for Montana. This result is supported by the fact that although several Intervenors have proposed certain conditions, no active Intervenor has recommended rejection of the transaction. Thus, the sole issue for decision by the Commission is to identify those conditions that may be appropriately imposed to ensure NorthWestern is providing adequate service and just and reasonable rates.

As to the specific conditions, NorthWestern and BBI agree to the imposition of the following conditions:

1. The acquisition premium paid by BBI for the stock of NorthWestern will not be

recovered in rates paid by the ratepayers of Montana;

2. The transaction costs incurred by NorthWestern and BBI relating to the acquisition will not be recovered in rates paid by the ratepayers of Montana;

3. To the extent NorthWestern undertakes capital projects that are not Public Utility (as defined by Section 69-3-101, MCA) projects (i.e., to provide conventional utility service), debt financing for such projects shall not be secured by Public Utility assets, rather such projects shall be financed utilizing non-recourse project financing. Further, any portion of any debt financing by BBI or its affiliates, other than NorthWestern, that is devoted to any purpose other than providing funds to NorthWestern for its Public Utility operations shall be non-recourse to NorthWestern;

4. The effective and continuing provisions of the Commission Consent Order 6505e, shall be supplemented as follows:

- a. The phrase "the ultimate parent corporation" (the "parent") shall mean NorthWestern.
- b. Affiliate should be defined as (i) any person that directly owns 5 per centum or more of the outstanding voting securities of NorthWestern, or (ii) any company with 5 per centum or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by NorthWestern.
- c. The board of directors that is established to govern NorthWestern shall have at least one independent director and such director shall have substantial utility experience or qualify as a financial expert as defined by the NASDAQ Stock Market Inc. Marketplace rules (Independent Director). NorthWestern shall maintain an Audit Committee and a

Governance Committee with an Independent Director serving as the chairperson of each such committee;

5. BBI will enable registration of the Commission and the MCC on BBI's website, with the effect that they will receive email notification of every public announcement made to the ASX, including a link to the announcement. This would include all public financial disclosure filings made by BBI in Australia to the ASIC or the ASX;

6. The Joint Applicants would propose to make periodic informational rate filings on September 30, 2009 and September 30, 2012. The NorthWestern filings would comply with the minimum electric and natural gas rate case filing standards provided in ARM 38.5.106 through 38.5.175, and would be based on a test year using the calendar year prior to the date of the filings. In the event NorthWestern filed a general rate case within eighteen months prior to each date listed above, it would not have to make the next scheduled informational rate filing;

7. Financial metrics:

Increased Liquidity Minimum – Increase and maintain the liquidity requirement in the Bankruptcy Stipulation from \$75,000,000 to \$100,000,000, and making it applicable on an end of quarter basis.

Book Equity to Consolidated Total Capitalization – Implement a stand-alone version of the book equity to consolidated total capitalization provision currently in the Bankruptcy Stipulation (40%) and make it a covenant applicable on an end of quarter basis. The ratio would be computed consistent with the existing SEC-based financial test in the Bankruptcy Stipulation, which currently applies to the Investment Basket Test for NorthWestern affiliate interest. (The definition of terms is in the text of the brief.)

Quarterly Reporting and Compliance – NorthWestern would report the results of its

Liquidity Minimum and its Book Equity to Consolidated Total Capitalization to the Commission following the date on which NorthWestern filed its quarterly SEC financial statement (10Q or 10K) in respect of such quarter ("Compliance Report"). Within 30 days following the issuance of a Compliance Report which indicated NorthWestern failed to meet either the Liquidity Minimum or Book Equity to Consolidated Total Capitalization test, NorthWestern would file a report with the Commission detailing the event(s) that led to such a result(s) and a plan of corrective action ("Corrective Plan").

If NorthWestern failed to restore its Liquidity Minimum and/or meet its Book Equity to Consolidated Total Capitalization test by the date of the next subsequent Compliance Report, or such later date as had been proposed by NorthWestern in its Corrective Plan and accepted by the Commission, the portion of any NorthWestern dividend payments to be made to its Parent Company in respect of such subsequent quarter and, if necessary, following quarters, related to its regulated Montana utility operations would then be limited to an amount no greater than that which would enable NorthWestern to promptly meet the Liquidity Minimum and the Book Equity to Consolidated Total Capitalization tests as demonstrated in subsequent quarterly Compliance Reports. The obligations to comply with and report these tests will expire once the tests have been met for three consecutive years (twelve quarters).

Credit Rating Measure – NorthWestern will take all measures necessary to ensure that it will have its own independent corporate credit rating and will use all reasonable efforts to maintain an investment grade rating, on regulated Montana utility secured debt, by at least two of the three major credit rating agencies;

8. It is BBI's intent that NorthWestern executives will prepare and submit to the

NorthWestern Board on an annual basis for the Board's review and approval, the following planning documents:

Asset Management Plan – The Asset Management Plan is a 10-15 year planning tool focusing on system planning, including asset technology and selection, regulatory undertakings, supply/demand balancing and the combined capital expenditures and operating expenditures required to meet the demands of the key business stakeholders over the long term.

Strategic Plan - The Strategic Plan is a 3-5 year planning tool that considers the range of key drivers relevant to NorthWestern's businesses (including engineering, financial, commercial, business and environmental factors) and provides stakeholders with information about the businesses' vision, mission, guiding principles and key customer, community and safety focus for the medium term period.

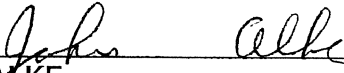
Annual Operating Plan - The Annual Operating Plan is a short-term plan which drives the key focus for the business for the immediate financial and reporting year. The output of the plan is the annual budget against which the board would approve and monitor performance. The Annual Operating Plan describes the expected management actions, revenue expectations and operating and capital expenditures for the period; and

9. Based upon a proper evaluation by NorthWestern and BBI of the two options, NorthWestern will either move its corporate headquarters to Montana after the three-year agreement with the South Dakota Commission has expired or establish a separate Montana regulated operations business entity.

By imposing the above conditions, the Commission should approve the proposed transaction by which BBI acquires all of the stock of NorthWestern which is merged with Glacier pursuant to the terms of the Agreement and Plan of Merger.

Dated this 11th day of April 2007.

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